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Supreme Court, U.S.
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No. 93-861

In The

Supreme Court of the United States

October Term, 1993

JOHN L. CHEEK

v.

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

The linchpin of the respondent's Brief in Opposition to the Petition for a Writ of Certiorari is its clear misstatement of this Court's holding in *Cheek v. United States*, 498 U.S. 192 (1991). The respondent states that this Court "expressly recognized that, in determining a person's state of mind, the jury may consider whether the person's beliefs were reasonable." (Resp. 7.)

Quite to the contrary, the entire thrust of this Court's reasoning in *Cheek* was that the jury may not consider the reasonableness of the defendant's beliefs. This Court repeated this holding throughout its opinion in order to ensure that it would not be misinterpreted. Nevertheless, the respondent, and the court below, have proceeded to misinterpret it.

To be sure, this Court, in giving reasons for reaching its conclusion in *Cheek*, made an observation about probable jury behavior that was addressed to the legal community reading its decision. This Court said:

> [T]he more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge.

498 U.S. at 203-04. This text constitutes part of the Supreme Court's reasoning to support is holding – reasoning addressed to the legal community that reads and studies the decisions of this Court. The text clearly does not constitute a prescription for instructions to be given

to a jury. One does not have to invoke the deconstructionist philosophy of Jacques Derrida to observe that texts are often intended to address different audiences. The primary audience of this Court's reasoned decisions is the legal community, including the courts below. On occasion this Court may address a different and more particular audience, such as it did in framing a "Miranda warning" for police officers or in prescribing an exact form of instruction to be made to juries in particular circumstances. But it is clearly impermissible in interpreting this Court's decisions to confuse and conflate the different audiences. It is clearly impermissible and fallacious to move from this court's reasoning in support of its decision to a verbal formula for the implementation of its decision. Yet this false move is apparently what the respondent made in order to reach its extraordinary conclusion that juries may consider whether the defendant's state of mind was reasonable – a conclusion that is the exact opposite of what this Court held in *Cheek*.

With respect to this critical interpretive issue, the petitioner respectfully suggests a simple analogy. Suppose that this Court were to hold, in an opinion regarding the use of testimony that stemmed from an unconstitutional search or seizure:

> Juries must be instructed to disregard inadvertent testimony if it was the fruit of an unconstitutional search or seizure, even though this kind of testimony is undoubtedly the best and most certain proof of a defendant's guilt.

Suppose that a trial judge in the next case instructs the jury in the following words:

> I want you to disregard the statement you've just heard, even though it is undoubtedly the best and most certain proof of the defendant's guilt in this case.

Under the respondent's argument in its Brief in Opposition, this would be a perfectly good instruction. However, the respondent would clearly be conflating and confusing two different audiences – the legal community reading this Court's opinion, and the trial judge seeking a form of wording that can be used to instruct juries – and thereby deliberately misinterpreting the entire point of the court's reasoning.

The foregoing is exactly what the respondent has done in its Brief in Opposition. It has lifted a sentence from this Court's reasoning in support of its holding – the holding that an objective standard of reasonableness cannot be part of the jury's factual determination whether a particular defendant knows his or her legal duty – and transformed the sentence into a jury instruction that eviscerates that very holding.

This Court's important decision in *Cheek v. United States*, 498 U.S. 192 (1991), should not be undermined by the respondent's approach, which reflects the approach taken by the Court of Appeals below. After all, the respondent will be prosecuting many other cases of statutory crimes. It has now clearly signalled, by its Brief in Opposition, that it regards a "reasonableness" instruction perfectly proper. There is no doubt that such an instruction could provide for the respondent a wide avenue of escape from the burden imposed upon prosecutors by this Court in its *Cheek* decision to prove factually that defendants know they violated a statute.

This Court's development of scienter in the area of statutory crime following *Cheek* was applied most notably and recently in *Ratzlaf v. United States*, 1994 U.S. Lexis 936. The Supreme Court should grant Mr. Cheek's petition for a writ of certiorari in order to protect the core holding of its decision in *Cheek*. In the alternative, this court should summarily reverse the decision below of the Court of Appeals of the Seventh Circuit.

Respectfully submitted,

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